

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7729

Petition of New Cingular Wireless PCS, LLC,)
d/b/a AT&T Mobility ("AT&T"), for authority to)
install a wireless communications facility in)
Weston, Vermont)

Order entered: 6/6/2011

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") approves the petition filed by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T" or the "Petitioner"), pursuant to 30 V.S.A. § 248a, and the Board's Order implementing standards and procedures under this section ("Procedures Order")¹, and grants the Petitioner a certificate of public good ("CPG") authorizing the installation of telecommunications facilities located in the Town of Weston, Vermont (the "Project"), as part of Petitioner's wireless telecommunications service upgrade.

II. BACKGROUND

This case involves a petition and prefiled testimony filed by the Petitioner on March 18, 2011, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the construction of the facilities identified above. Pursuant to the Procedures Order:

If any person wishes to submit comments to the Board concerning an application filed pursuant to Section 248a or request a hearing, such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required parties.²

On April 4, 2011, Robert Johnston, vice chair of the Town of Weston Selectboard, filed a letter with the Board stating that the Petitioner had given consideration to the concerns expressed by the Town during the advance notice period regarding tower height and location. Mr. Johnston

1. *Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 14, 2009.

2. Procedures Order at 9.

also noted that the Project would not provide coverage to the entire town and expressed his desire for additional coverage in the future.

On April 6, 2011, C. Daniel Hershenson, Esq., and Nathan H. Stearns, Esq., filed a notice of appearance and motions to intervene on behalf of Barrett Holby, Grethe Holby, Kristin Holby, and Wegard Holby (together the "Holbys"), neighboring landowners to the parcel on which the Project is proposed to be located. The Holbys claim that the Project will have an undue adverse aesthetic impact on views from their properties, that the Project tower could fall onto their property, that Project construction may impact streams and wetlands, and that the Project does not comply with the Weston Town Plan and Zoning Bylaws. The Holbys are seeking to intervene on these grounds.

On April 8, 2011, the Vermont Department of Public Service ("Department") filed a letter with the Board stating that the Project will promote the general good of the State consistent with 30 V.S.A. § 202c(b) and recommending that the Board approve the Project without additional hearings or investigation.

On April 19, 2011, AT&T filed a memorandum in opposition to the Holbys' motion for intervention.

No other comments regarding the Project have been filed with the Board.

The Board has determined that the petition and prefiled testimony have effectively addressed the applicable substantive criteria of 30 V.S.A. § 248a. Consequently, we find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and no hearings are required.

III. PROCEDURAL ISSUES

Motions to Intervene

Barrett Holby, Grethe Holby, Kristin Holby, and Wegard Holby, respectively, request to be granted intervention in these proceedings pursuant to Board Rule 2.209. Barrett Holby, and Grethe and Kristin Holby, jointly, are owners of two parcels that abut the Project property. Wegard Holby owns a neighboring parcel of land that does not abut the Project property. In support of their respective motions, each of the Holbys claim that they will have a direct view of

the Project and they "believe" it will impact views from their property.³ All of the motions also contend that the Project does not comply with the Town Plan and Zoning Bylaws. In addition to these concerns, Grethe and Kristen Holby, in their motion, claim that the Project tower is located closer to their property line than allowed by town setback requirements and could fall onto their property in the event of a collapse.⁴ Grethe and Kristen Holby also state that the access road and erosion and runoff from the Project "may" impact streams and wetlands that extend onto their property. Therefore, the Holbys argue that they each have a substantial interest in the outcome of these proceedings and that this interest is not represented by any other party to these proceedings.

AT&T requests that the Board deny the Holbys' motion because they have failed to "set forth a specific and concrete offer of proof to satisfy the standards for intervention under Board Rule 2.209."⁵ Further, AT&T maintains that should intervention be granted that the Holbys have failed to demonstrate that the Project will "raise a significant issue under the relevant criteria in 30 V.S.A. § 248a(c)(1) and (c)(2)."⁶ AT&T states that it has engaged in an extensive dialogue with the Town of Weston and has also met with Barrett Holby and counsel in an effort to address concerns with the Project. AT&T notes that the Weston Planning Commission requested that the Project be located "as far as practicable" from the property line shared with the Holbys "without experiencing a significant drop in coverage."⁷ AT&T states that the Town also requested that the height of the tower be lowered from 150 feet to 120 feet. AT&T maintains that moving the Project further from the property line shared with the Holbys in order to lessen the impacts on their properties would necessitate using a taller tower in order to maintain the same level of coverage and would, therefore, conflict with the Town's directives. In addition, AT&T contends that the Holbys have provided "no concrete and specific evidence of a causal connection between

3. Holby Motion at 1, 3 and 4.

4. Holby Motion at 2.

5. AT&T Response at 1.

6. *Id.*

7. AT&T Response at 3.

the Project and their asserted interests."⁸ Further, AT&T argues, should the Board grant intervention in this case, "there is nevertheless no basis to find that the Petition raises a significant issue under any of the relevant criteria."⁹

In accordance with Board Rule 2.209, persons who seek to intervene must demonstrate an interest which may be adversely affected by the outcome of the proceeding. In this case, the Holbys have not provided any evidence, with the exception of a site plan depicting the locations of their various properties and the Project property, to support their contention that the Project may result in the impacts they describe. Nevertheless, the Holbys have articulated an interest in ensuring that these impacts do not come to pass. Therefore, the Board grants the Holbys permissive intervention, pursuant to Board Rule 2.209(B), limited to the concerns expressed in the respective motions to intervene.

Significant Issues

Section 248a(f) establishes the following review procedures for applications submitted pursuant to Section 248a:

Unless the public service board identifies that an application raises a significant issue, the board shall issue a final determination on an application filed pursuant to this section within 90 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 90 days of the date on which the clerk of the board notifies the applicant that the filing is complete. If the board rules that an application raises a significant issue, it shall issue a final determination on an application filed pursuant to this section within 180 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 180 days of the date on which the clerk of the board notifies the applicant that the filing is complete.

Section 248a(k) provides that the Board "may issue rules or orders implementing and interpreting this section. In developing such rules or orders, the board shall seek to simplify the application and review process as appropriate" Pursuant to this authority, the Board issued the Procedures Order, which requires that any comments and requests for hearing concerning a

8. *Id.* at 6.

9. *Id.* at 7.

Section 248a application must be filed with the Board within 21 calendar days of the date that the application was submitted.¹⁰

Here, the only comments submitted within the 21-day period were those of Mr. Johnston and the Department, neither of which contended that the application raised a significant issue. No requests for hearing were submitted.

The Holbys' motions for intervention were submitted within 21 days of the application being filed, but those motions do not demonstrate that the Project raises a significant issue with respect to the applicable criteria. The Holbys, in describing their grounds for intervention, contend that the Project may have the potential to cause the impacts they describe. However, they have provided no basis to support their contention and have not addressed the evidence filed by AT&T demonstrating that the Project will not raise a significant issue under the criteria cited in the motions. We also note that the Holbys have not requested a hearing in this matter or filed additional comments in this proceeding within the prescribed comment period pursuant to the Procedures Order. Therefore we conclude that the application does not raise a significant issue, and no hearing is required.

IV. FINDINGS

1. The Project involves the installation of a new wireless telecommunications facility in Weston, Vermont. The Project is part of AT&T's Universal Mobile Telecommunications Service ("UMTS") upgrade that involves the installation and modification of wireless telecommunications services in Vermont. The ultimate objective of the project is to upgrade AT&T's Vermont network to provide 3G wireless technologies for simultaneous circuit-switched voice and packet-switched data communications. Exh. JP-3-6.B.1 § III.

2. The Project is to be located at 47 Slawson Road in Weston, Vermont. Exh. JP-3-6.B.1 § I.

3. The Project involves the installation of a new monopole telecommunications tower with antennas, an equipment shelter, a generator, and associated operating equipment within a new

10. Procedures Order at 9.

fenced compound on property leased by AT&T. The Project also includes the construction of a new access road and a parking/turn-around area. Exh. JP-3-6.B.1 § II.

4. The facilities include a new 120-foot-tall self-supporting monopine tower with up to twelve antennas, each measuring approximately 55 inches high by 12 inches wide by 6 inches deep, mounted at a height of 118 feet on the tower. The equipment shelter will be approximately 11.5 feet by 20 feet and 10 feet high. The diesel-fueled generator will be mounted on a 4-foot by 11-foot platform within the 50-foot by 50-foot fenced compound. The Project also includes the construction of a new access road, extending 1700 feet from Vermont Route 100, and a parking/turn-around area, transformer and bollards to be located directly south of the compound. Exhs. JP-3-6.B.1 § II and JP-3-6.B.2.

State Telecommunications Policy

[30 V.S.A. § 248a(a)]

5. The Project is consistent with the goal of directing the benefits of improved telecommunications technology to all Vermonters pursuant to 30 V.S.A. § 202c(b). The Project will allow interconnection with the other similar AT&T facilities comprising AT&T's Vermont network, some of which have already been upgraded and others that are slated for improvements. Exh JP-3-6.B.1 § III.

**Aesthetics, Historical Sites, Air and Water Purity,
the Natural Environment, and Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

6. The Project will not have an undue adverse effect on aesthetics, historical sites, air and water purity, the natural environment, and the public health and safety. This finding is supported by findings 7 through 32, below.

Public Health and Safety

[30 V.S.A. § 248a(c)(1)]

7. The Project tower will be located approximately 60 feet from the nearest property boundary. However, the tower and tower foundation will be designed to meet industry safety standards with the tower designed to collapse onto itself in the event of failure, rather than topple over onto adjacent properties. Exhs. JP-3-6.B.1 §§ IV, V; JP-3-6.B.2; JP-3-6.B.8.

Outstanding Resource Waters, Headwaters

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

8. The Project will have no impact on outstanding resource waters or headwaters. Exh. JP-3-6.B.1 § IV.

Water and Air Pollution

[10 V.S.A. § 6086(a)(1)]

9. The Project will not result in undue water or air pollution. This finding is supported by findings 10 through 12, below.

10. Dust associated with construction vehicles will be controlled at the site. Exh. JP-3-6.B.1 § IV.

11. Noise associated with construction activities will be short term, and noise from the generator will be limited in the absence of a prolonged power outage. Exh. JP-3-6.B.1 § IV.

12. The Radio Frequency Radiation ("RFR") associated with the Project will meet all standards prescribed by the Federal Communications Commission ("FCC"). The RFR emissions from the antenna installation is calculated to be 21.83% of the FCC standard for Uncontrolled/General Public Maximum Permissible Exposure. Exh. JP-3-6.B.6.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

13. The Project does not involve disposal of wastes or injection of any material into ground water or wells. Exh. JP-3-6.B.1 § IV.

Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(1)(C),(a)(2) and (3)]

14. The Project will have minimal impact on water conservation measures, as the Project will not be connected to water supplies. Any water needed in connection with Project construction will be brought in from sources off of the Project site. Exh. JP-3-6.B.1 § IV.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

15. The Project is not located in a floodway. Exh. JP-3-6.B.1 § IV.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

16. The Project access road will be located near and cross over a small perennial stream. Feeding into this is a narrow intermittent stream channel and seasonally flooded wetlands. AT&T will undertake engineering measures, including the installation of a culvert, that will minimize potential impacts to the stream and seasonal wetlands. Exh. JP-3-6.B.1 § IV.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

17. The Project is not located on a shoreline. Exh. JP-3-6.B.1 § IV.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

18. The Project access road will be located near seasonally flooded wetlands. AT&T will undertake engineering measures that will minimize potential impacts to the seasonal wetlands. Exh. JP-3-6.B.1 § IV.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

19. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. All construction work will comply with Vermont standards and specifications for erosion and sediment control. Exh. JP-3-6.B.1 § IV.

Transportation System

[10 V.S.A. § 6086(a)(5)]

20. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, and other means of transportation existing or proposed. Traffic to the unmanned site will be limited following construction. Exh. JP-3-6.B.1 § IV.

Educational Services

[10 V.S.A. § 6086(a)(6)]

21. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be impacted by the Project. Exh. JP-3-6.B.1 § IV.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

22. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. The Project will not require any additional municipal or governmental services. Exh. JP-3-6.B.1 § IV.

Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

23. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 24 through 31, below.

24. In order to demonstrate the aesthetic impact of the Project on the surrounding area, AT&T has submitted photo simulations depicting views of the Project based on a balloon test that took place on September 2, 2010. AT&T has also incorporated many of the recommendations from the Weston Planning Commission and Selectboard regarding aesthetic mitigation. Exh. JP-3-6.B.1 § IV.

25. AT&T has taken generally available steps to mitigate the aesthetic impacts associated with the Project. The height of the Project tower was reduced from the originally proposed 150 feet to 120 feet in response to recommendations from the town. The Project will utilize a monopine tower design and will be located in a forested area, with an average tree canopy elevation of 85 feet, to provide screening for the compound, shelter and lower levels of the tower from certain vantage points. Exhs. JP-3-6.B.1 § IV and JP-3-6.B.2.

26. AT&T has evaluated alternative sites for the Project to accommodate neighboring landowners' concerns regarding aesthetic impacts. In order to keep the tower height at 120 feet

and provide adequate coverage within the area, the proposed Project site is the best available. Exh. JP-3-6.B.1 § IV.

27. The Project would not be considered shocking or offensive to the average viewer. Exh. JP-3-6.B.1 § IV.

28. The Project does not violate any clearly identified community standards contained in the relevant regional or town plans. Exh. JP-3-6.B.1 §§ IV-V.

29. The Project will not have an adverse impact on known historic sites. Exhs. JP-3-6.B.1 § IV and JP-6.B.7.

30. The Project will not have an adverse impact on irreplaceable natural areas. Exhs. JP-3-6.B.1 § IV and JP-6.B.7.

31. The Project will not destroy or significantly imperil endangered species or necessary wildlife habitat. Exh. JP-3-6.B.1 § IV.

Discussion

Based on the above findings, the Board finds that this project will not have an undue adverse effect on the aesthetics or scenic and natural beauty of the area. In reaching this conclusion, the Board has relied on the Environmental Board's methodology for determination of "undue" adverse effects on aesthetics and scenic and natural beauty as outlined in the so-called Quechee Lakes decision. *Quechee Lakes Corporation*, #3W0411-EB and 3W0439-EB, dated January 13, 1986.

As required by this decision, it is first appropriate to determine if the impact of the project will be adverse. The project would have an adverse impact on the aesthetics of the area if its design is out of context or not in harmony with the area in which it is located. If it is found that the impact would be adverse, it is then necessary to determine that such an impact would be "undue." Such a finding would be required if the project violates a clear written community standard intended to preserve the aesthetics or scenic beauty of the area, if it would offend the sensibilities of the average person, or if generally available mitigating steps will not be taken to improve the harmony of the project with its surroundings. The Board's assessment of whether a

particular project will have an "undue" adverse effect based on these three standards will be significantly informed by the overall societal benefits of the project.¹¹

In this case, the Project will be located in a primarily forested area and would, therefore, be considered out of context with its surroundings. However, as noted in the above findings, the Project does not violate a clear written community standard and will not offend the sensibilities of the average person. In addition, the Petitioner has taken generally available steps, including the use of a monopine tower, siting the Project in a forested area, which will provide screening, and reducing the height of the tower from that originally proposed, which will minimize the impact of the Project on its surroundings. Therefore, we conclude that the Project will not have an undue adverse impact on the aesthetics of the surrounding area.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

32. The Project will not unnecessarily or unreasonably endanger any public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to public investments. Exh. JP-3-6.B.1 § IV.

Town and Regional Plans

[30 V.S.A. § 248a(c)(2)]

33. By facilitating the expansion of telecommunications coverage in the area, the Project is consistent with the land conservation measures contained in the Weston Town Plan and Windham Regional Plan. Exh. JP-3-6.B.1 §§ V, VI.

State and Local Permits

[30 V.S.A. § 248a(d)]

34. There are presently no permits related to the parcel on which the Project is to be located. Exh. JP-3-6.B.1 § VII.

11. Consider, for example, the benefits of an increase in wireless telecommunications services, or other social benefits.

V. CONCLUSION

Pursuant to 30 V.S.A. § 248a(a):

Notwithstanding any other provision of law, if the applicant seeks approval for the construction or installation of telecommunications facilities that are to be interconnected with other telecommunications facilities proposed or already in existence, the applicant may obtain a certificate of public good issued by the public service board under this section, which the board may grant if it finds that the facilities will promote the general good of the state consistent with subsection 202c(b) of this title.

Further, pursuant to the Procedures Order:

Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 90 days of its filing

Based upon all of the above evidence, the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and the proposed Project will promote the general good of the State.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the installation and operation of communications facilities at the location specified in the above findings, by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall be issued in this matter.

Dated at Montpelier, Vermont, this 6th day June, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: June 6, 2011

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.